No. 83-981

In the Supreme Court of the United States

OCTOBER TERM, 1983

STANLEY SPENCER, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

LAWRENCE BLATNIK
Attorney

National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether, in determining whether "the position of the United States" was "substantially justified" so as to preclude an award of attorneys' fees under Section 204(a) of the Equal Access to Justice Act, 28 U.S.C. (Supp. V) 2412(d)(1)(A), the court of appeals correctly looked to the government's position in defending the lawsuit, rather than to its position in the agency proceedings that precipitated the litigation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and regulation: Page

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-981

STANLEY SPENCER, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1c-62c) is reported at 712 F.2d 539. The opinion and order of the district court (Pet. App. 1b-22b) is reported at 548 F. Supp. 256.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1983. A petition for rehearing was denied on September 13, 1983 (Pet. App. 1d-2d). The petition for a writ of certiorari was filed on December 12, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 204(a) of the Equal Access to Justice Act (EAJA), 28 U.S.C. (Supp. V) 2412(d)(1)(A), provides as follows:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

STATEMENT

1. Petitioners are professional engineers employed by the Utah Power and Light Company (the Company) (Pet. App. 4b, 3c). In 1938, the Company voluntarily recognized Local 57 of the International Brotherhood of Electrical Workers (the Union) as the exclusive bargaining representative of its employees (*id.* at 3c-4c). The Company and the Union agreed that the bargaining unit would consist of all employees except managerial employees and supervisors with the authority to hire and fire. Included in the bargaining unit, therefore, were non-supervisory engineers. The Board assented to the parties' stipulation and certified the Union. *Id.* at 4c.

By 1978, the bargaining unit consisted of approximately 2,600 employees, including about 100 electrical or mechanical engineers with advanced degrees (Pet. App. 4c). During that year, 72 of the engi-

neers filed a petition with the Board (NLRB Case No. 27-RC-459) seeking an election to decertify the Union as their bargaining representative. The engineers contended that they were professional employees entitled under Section 9(b)(1) of the National Labor Relations Act (NLRA), 29 U.S.C. 159 (b)(1),[1] to a separate election to determine whether they wished to be included in a bargaining unit with non-professional employees. The Board's Regional Director dismissed the petition on the ground that established Board policy requires the unit in a decertification election to be coextensive with the unit previously certified or recognized. The Board denied a petition for review of the dismissal. Pet. App. 4c-5c.

In January 1979, petitioners amended their decertification petition, requesting that the scope of the unit be "clarified" so as to exclude them (NLRB Case No. 27-UC-52). The Regional Director dismissed the amended petition on the ground that petitioners were neither a labor organization nor an employer and therefore lacked standing under the applicable Board rules (29 C.F.R. 102.60(b)) to petition for unit clarification. Pet. App. 5c.

In September 1979, petitioners sued the Board and its Regional Director in the United States District

---

[1] Section 9(b)(1), which was added to the NLRA by the Labor Management Relations Act (Taft-Hartley Act) in 1947, ch. 120, § 101, 61 Stat. 143, provides that the Board "shall not (1) decide that any unit is appropriate for [collective bargaining] purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit * * *." The "mixed" bargaining unit at issue in this case was, as noted above, established by agreement between the Company and the Union nine years prior to the enactment of Section 9(b)(1).

Court for the District of Columbia, seeking a declaration that they were "professional employees" within the meaning of Section 2(12) of the NLRA, 29 U.S.C. 152(12), and an injunction directing the Board to provide them with a separate representation election (Pet. App. 4b, 5c). In its answer, the Board admitted most of the factual allegations contained in the complaint but maintained that the district court lacked subject matter jurisdiction over the controversy and that petitioners had failed to state a claim on which relief could be granted. Thereafter, the parties filed cross-motions for summary judgment. *Ibid.*

In November 1980, while the district court action was pending, two of the engineers filed a second decertification petition with the Board (NLRB Case No. 27-RC-535). Following a hearing on the petition, the Board issued a decision in which it ordered its Regional Director to conduct a decertification election limited to professional engineers within the larger bargaining unit. *Utah Power & Light Co.*, 258 N.L.R.B. 1059 (1981). The Board reaffirmed its general policy against directing a decertification election for a unit that is not coextensive with the existing bargaining unit, but it concluded that an exception to that general rule was warranted in this case because the professional employees seeking decertification had never had an opportunity to vote in a self-determination election, as now provided by Section 9(b)(1) of the Act, 29 U.S.C. 159(b)(1) (Pet. App. 4b-5b, 6c). See page 3 note 1, *supra*.

The decertification election was held on October 29, 1981, and the engineers voted against continued representation by the Union (Pet. App. 5b, 6c). On November 6, 1981, the Board moved to dismiss peti-

tioners' district court action as moot. Petitioners did not oppose the Board's motion but filed with the district court an application for costs and attorneys' fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. (Supp. V) 2412. The Board opposed the application. Pet. App. 6c.

2. On May 28, 1982, the district court granted the Board's motion to dismiss the pending action as moot (Pet. App. 2b). The court held that petitioners qualified as "prevailing parties" within the meaning of 28 U.S.C. (Supp. V) 2412(a) and therefore granted their motion for reasonable costs incurred in the litigation (Pet. App. 7b-9b). However, the court denied petitioners' request for attorneys' fees, holding that the Board had sustained its burden of establishing that its position in the dispute was "substantially justified" (*id.* at 14b, 19b-21b). The court found it unnecessary to resolve the issue on which petitioners seek this Court's review, concluding that there was "a reasonable basis in law and fact for the Board's position at [both] the administrative and judicial stages of this controversy" (*id.* at 14b; see also *id.* at 14b n.14).

The district court also rejected petitioners' claim for attorneys' fees under 28 U.S.C. (Supp. V) 2412 (b), which makes the United States generally liable for attorneys' fees "to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for" an award of attorneys' fees. The court found "no basis for any contention that the Board acted in bad faith, vexatiously, wantonly or for oppressive reasons at either the agency or the judicial level" (Pet. App. 21b), which was the underlying theory on

which petitioners had based their claim for fees under Section 2412(b).

3. In an exceedingly comprehensive opinion, the court of appeals unanimously affirmed the district court's order denying petitioners' application for attorneys' fees (Pet. App. 1c-62c). Resolving the issue that the district court had left open (see page 5, *supra*), the court of appeals concluded that, for purposes of Section 2412(d)(1)(A) of the EAJA, the government must show that its position in litigation, rather than the underlying agency action that precipitated the litigation, was "substantially justified" (*id.* at 13c-36c).[2] The court further concluded that the Board's litigating position—that the district court lacked jurisdiction, under the doctrine enunciated in

---

[2] The court of appeals explained its reason for deciding the issue left open by the district court as follows (Pet. App. 15c n.29):

> [T]he Board, in litigation before the District Court, took the position, not that its actions were legally correct, but that they were not so flagrantly violative of an express statutory prohibition as to warrant exercise of jurisdiction by the District Court. * * * That argument might have been "substantially justified" even if the Board's interpretation of its enabling act were clearly incorrect. The meaning of "the position of the United States" thus becomes crucial. If the phrase is defined as the government's underlying action, we must pass upon the District Court's holding that the Board's denial of the [petitioners'] two petitions was "substantially justified." If, by contrast, the phrase is defined as the government's litigation position, we need not consider that aspect of the court's ruling and can confine our attention to the court's assessment of the strength of the Board's argument that it had not stepped so plainly beyond the boundaries defined by the National Labor Relations Act as to justify judicial intervention.

Leedom v. *Kyne*, 358 U.S. 184 (1958),[3] to review the Board's denial of petitioners' decertification and unit clarification petitions—was substantially justified. The court stated (Pet. App. 61c (emphasis in original)):

> [T]he Board's *litigation position*—grounded on *Leedom v. Kyne*—was well founded and very likely would have barred the District Court from accepting jurisdiction over the [petitioners'] suit. Indeed, on the facts of this case, even if the Board itself had conceded that its long-standing policy on decertification petitions was patently erroneous, the District Court very likely would not have had jurisdiction to decide the merits. In other words, if the matter had been fully litigated, it is highly doubtful that the [petitioners] could have been "prevailing parties" because the District Court probably was without authority to hear their case. As it turned out, the [petitioners] were properly found to be "prevailing parties" because the case was dismissed as moot without a decision on the jurisdictional issue; this does not, however, alter our finding that the government's litigation position was substantially justified.

The court of appeals also agreed with the district court's determination that petitioners were not entitled to an award of attorneys' fees under 28 U.S.C. (Supp. V) 2412(b). The court reasoned that although "[t]here may be cases in which the assertion

---

[3] In *Leedom* v. *Kyne*, 358 U.S. at 188-190, this Court held that Board determinations in representation proceedings are not subject to district court review unless the Board acts in a manner that contravenes an express statutory prohibition and the aggrieved party has no alternative avenue for securing relief.

of 'substantially justified' legal arguments can fairly be characterized as vexatious, wanton, or oppressive, * * * this is certainly not one of them" (Pet. App. 62c).

ARGUMENT

Petitioners no longer dispute the district court's determination, upheld by the court of appeals, that they are not entitled to attorneys' fees under the "bad faith" rationale incorporated in 28 U.S.C. (Supp. V) 2412(b). Nor do petitioners quarrel with the lower courts' conclusion that the Board's litigating position was substantially justified. Rather, petitioners contend that the court of appeals erred in not assessing the Board's actions in the underlying representation proceedings as well as its litigation position in making the substantial justification determination. Petitioners rely primarily (Pet. 15-18) on the Third Circuit's decision in *NRDC* v. *EPA*, 703 F.2d 700 (1983), in which the court examined the agency's underlying action, in support of their contention that the question presented in this case has created a conflict among the circuits requiring this Court's review. As we demonstrate below, however, the decision of the court of appeals in the instant case is correct, and the asserted conflict with the Third Circuit does not warrant this Court's review.

1. As the court of appeals noted (Pet. App. 16c-20c), neither the statutory language nor the legislative history of the EAJA definitively answers the question whether the "position of the United States" that must be substantially justified is the government's litigation position in the judicial action for which attorneys' fees are sought or the underlying agency action that precipitated the suit. Neverthe-

less, the "normal meaning" of the text of Section 2412(d)(1)(A) suggests that "the position of the United States refers to the government's position in court and not before [the agency]." *Broad Avenue Laundry & Tailoring* v. *United States*, 693 F.2d 1387, 1390 (Fed. Cir. 1982). As the Federal Circuit explained (*ibid.* (brackets in original)):

> The Act provides for the awarding against the United States of attorney's fees "incurred by [the prevailing] party in any civil action . . . in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified." A fair and reasonable reading of those words is that the position referred to is that taken by the United States in the "civil action" in which the attorney's fees were "incurred." The provision addresses the award of attorney's fees in a civil action in court, and it is in that particular action in which the government takes a position.

Moreover, although Section 2412(d)(1)(A) does not expressly specify whether courts are to look to the government's litigation position or to its position in the underlying administrative proceedings, other sections of the EAJA shed light on the issue. Thus, 28 U.S.C. (Supp. V) 2412(d)(3) (emphasis added) provides that, in awarding fees to a prevailing party in an action for judicial review of an adversary agency adjudication, the court shall include in that award fees and expenses incurred in the course of litigation before the agency unless the court finds "that *during such adversary adjudication* the position of the United States was substantially justified." As the court of appeals reasoned here (Pet. App. 17c (footnote omitted)):

> [T]he highlighted language indicates * * * that the government's "position," for the purpose of assessing its liability for attorneys' fees resulting from administrative adjudication, is the stance it adopted in litigation before the agency. It remains possible, of course, that the phrase "position of the United States" was intended to have a different meaning when used in the context of litigation before the courts, but if Congress contemplated such a difference, it failed to indicate as much in the statute. In short, the unequivocal adoption of the "litigation position" theory in section 2412(d)(3) suggests that the identical phrase, when used without qualification in section 2412(d)(1)(A), should be interpreted as the posture adopted by the government before the court.

Accord, *Broad Avenue Laundry & Tailoring*, 693 F.2d at 1390-1391; *Tyler Business Services, Inc.* v. *NLRB*, 695 F.2d 73, 75-76 (4th Cir. 1982).

2. While we thus believe that the rule adopted by the court of appeals in this case best comports with the statutory language, it is important to note, as the court of appeals itself recognized (Pet. App. 25c-26c), that the issue petitioners ask this Court to decide is of little practical importance. In all but a handful of cases, the government's "litigation position" is simply a defense of the underlying agency action that precipitated the court proceeding; accordingly, a claimant's entitlement to attorneys' fees ordinarily will not be affected by any distinction between what the court of appeals called the "litigation position" theory and the "underlying action" theory (*id.* at 14c). For this reason, a number of courts have found it unnecessary to resolve the is-

sue presented by petitioners. See, *e.g.*, cases cited at Pet. App. 25c n.45.

Nevertheless, as noted by the court of appeals (Pet. App. 26c-36c), the government's litigation position in certain categories of cases is different from its position in the underlying administrative proceeding. Among such situations are those in which the government defends against a civil suit on grounds unrelated to the merits of its administrative action. The court of appeals reasonably concluded that, where the government has legitimate defenses unrelated to the merits of the underlying agency action, "tying EAJA awards to the strength of the justification for the government's original action would discourage counsel for the government from asserting defenses unrelated to its officials' conduct that have a significant chance of prevailing. Such an outcome seems both unfortunate, from a policy standpoint, and inconsistent with Congress' desire not to chill legitimate efforts by the executive to enforce the law" (Pet. App. 32c).[4]

---

[4] The central objective of the EAJA, as explained in the preamble to the statute (Pub. L. No. 96-481, § 202, 94 Stat. 2325, 5 U.S.C. 504 note), is to enable private parties to challenge unreasonable or oppressive governmental action by diminishing the deterrent effect of incurring large litigation expenses. At the same time, however, Congress did not wish to inhibit legitimate efforts by the government to enforce the law and sought to avoid imposing potentially huge costs on the federal treasury; accordingly, Congress declined to enact a provision for the automatic award of attorneys' fees to private parties who prevailed in suits against the government. See S. Rep. 96-253, 96th Cong., 1st Sess. 6 (1979); H.R. Rep. 96-1418, 96th Cong., 2d Sess. 10 (1980). Instead, Congress selected an intermediate position designed to balance "the constitutional obligation of the executive branch to see that

Assessing the Board's litigation position rather than its position in the underlying administrative proceedings is particularly appropriate in the circumstances of this case. The Board's principal defense in the district court proceeding was that the district court lacked jurisdiction over the suit initiated by petitioners. In support of its position, the Board relied on well-settled authority holding that Board determinations in representation proceedings ordinarily are not reviewable in the district courts, but rather are subject to review in the courts of appeals under Section 10(e) and (f) of the NLRA, 29 U.S.C. 160 (e) and (f), only if and when those determinations form the basis for a "final order" issued in an unfair labor practice proceeding. *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 476-477 (1964); *American Federation of Labor* v. *NLRB*, 308 U.S. 401, 409 (1940). The Board further argued that its refusal to grant petitioners' request for an election to determine their unit placement did not violate a "clear and mandatory" statutory provision so as to justify invocation of district court jurisdiction under the limited exception recognized in *Leedom* v. *Kyne*, 358 U.S. at 188-189. The court of appeals correctly concluded that the Board's lack of jurisdiction defense was substantially justified (see page 7, *supra*).

While the primary purpose of the EAJA was to remove financial obstacles to the filing of well-founded civil suits (see page 11 note 4, *supra*), that purpose can have no application where, as here, the government is substantially justified in contending that the suit was brought in a court that lacked ju-

---

the laws are faithfully executed against the public interest in encouraging parties to vindicate their rights" (H.R. Rep. 96-1418, *supra*, at 10; S. Rep. 96-253, *supra*, at 6).

risdiction to consider the matter. If litigants are not entitled to an adjudication of their claim by the district court, the EAJA should not be interpreted to encourage them to make such a claim.[5] Indeed, the statute itself provides that fees may be awarded only by a court "having jurisdiction of [the] action" (28 U.S.C. (Supp. V) 2412(d)(1)(A)), thus confirming the common-sense notion that Congress had no intention of encouraging the filing of jurisdictionally-defective lawsuits, regardless of the merits of the agency's underlying action. See *Lane* v. *United States*, No. 83-1524 (1st Cir. Feb. 8, 1984) (fees under EAJA denied notwithstanding plaintiff's status as a prevailing party, occasioned by government concession, because the district court lacked subject matter jurisdiction over plaintiff's claim).

3. The rule adopted by the court below has been adopted by several other circuits as well. See *United States* v. *2,116 Boxes of Boned Beef*, No. 82-1537 (10th Cir. Jan. 23, 1984); *Tyler Business Services, Inc.* v. *NLRB*, *supra*; *Broad Avenue Laundry & Tailoring* v. *United States*, *supra*; see also *S&H Riggers & Erectors, Inc.* v. *Occupational Safety & Health Review Comm'n*, 672 F.2d 426 (5th Cir.

[5] In addition to jurisdictional defenses of the type involved in this case, the government may have a well-founded argument that a particular suit is barred by mootness, lack of standing, expiration of the relevant statute of limitations, sovereign immunity, or other similar doctrines. As the court of appeals recognized (Pet. App. 31c-32c), the government should not be deterred from raising such legitimate defenses by the possibility of having to pay attorneys' fees. Petitioners cite no legislative history to support the notion that Congress intended government attorneys to forego such defenses (some of which are not properly waivable in any event) whenever the underlying agency action might be difficult to defend on the merits.

1982). Nevertheless, petitioners contend that the rule adopted by the Third Circuit in *NRDC* v. *EPA*, *supra*, represents the correct interpretation of the Act.[6] Each panel member wrote a separate opinion

[6] In their "Question Presented" (Pet. i), petitioners assert that the decision below is "in direct conflict with the Second and Third Circuits." But petitioners do not rely on any Second Circuit cases, and the Second Circuit has expressly declined to decide whether "position of the United States" refers to the underlying agency action or the government's litigation position. See *Environmental Defense Fund, Inc.* v. *Watt*, 722 F.2d 1081, 1085 (1983). Subsequent to the filing of the petition, the Ninth Circuit adopted a rule that is arguably more in keeping with the Third Circuit's decision in *NRDC* v. *EPA*, *supra*, than with the decision below. In *Rawlings* v. *Heckler*, No. 82-4545 (9th Cir. Feb. 13, 1984), the court held that it would consider "the totality of the circumstances prelitigation and during trial" (slip op. 7-8). On the other hand, *Rawlings* may be read consistently with the decision below. In deciding to award fees, the *Rawlings* court noted that it had taken the government a full year to settle the lawsuit (slip op. 8-9). In the decision below, the court of appeals observed (Pet. App. 34c n.58), in a discussion of the appropriate standard in cases settled by the government, that "if the government does not immediately accede to the plaintiff's demand, but instead initially opposes his claims and then at some later stage (*e.g.*, in a pre-trial settlement) surrenders, the United States will be liable for attorneys' fees regardless of which theory is applied."

Contrary to petitioners' claim (Pet. 16 n.5), the Fourth Circuit has not held that "position of the United States" in Section 2412(d)(1)(A) of the EAJA refers to both the underlying agency action and the government's litigation position. In *Tyler Business Services, Inc.* v. *NLRB*, 695 F.2d at 75, that court held unequivocally that the phrase "position of the United States" should be interpreted as referring to the government's position as a party in prosecuting or defending the court litigation under review and not its position in the underlying agency action that gave rise to the litigation. In *Amidon* v. *Lehman*, No. 82-2028 (Jan. 13, 1984), the Fourth Circuit

in that case. Judge Gibbons, in an opinion announcing the judgment of the court, was of the view that "the word 'position' [in Section 2412(d)(1)(A)] refers to the agency action which made it necessary for the party to file suit" (703 F.2d at 707). Applying that test, he concluded that EPA's position was not substantially justified. District Judge Thompson, sitting by designation, concurred in the decision to award fees, but she did not fully endorse Judge Gibbons' definition of "position of the United States." In Judge Thompson's view, a court should assess *both* the underlying agency action and the government's litigation position in determining whether the government's position was substantially justified. *Id.* at 714-715. Judge Hunter dissented from the award of

---

expressly reaffirmed the rule it adopted in *Tyler Business Services* and reversed the district court's award of fees because that court had "improperly looked to prelitigation events in evaluating the Government's position" (*Amidon*, slip op. 8). *Guthrie* v. *Schweiker*, 718 F.2d 104, 108 (4th Cir. 1983), on which petitioners rely (Pet. 16 n.5), dealt with the usual situation in which the government's litigation position and the underlying agency action are the same. The court stated that "the government's position in the district court normally would be substantially justified if, as is usual, the United States attorney does no more than rely on an arguably defensible administrative record" (718 F.2d at 108). The court did not express any view on the issue here, in which the underlying agency action and the litigating position are different.

Petitioners also rely (Pet. 7-8, 15-16 & n.5) on various district court decisions to support their assertion of a conflict among the circuits. The inconsistent decisions of the United States District Court for the District of Columbia, on which petitioners rely most heavily (Pet. 15), have of course been overruled by the court of appeals' decision herein. In any event, conflicting district court decisions plainly cannot support a claim of inter-circuit conflict.

fees because he was of the view that it is the government's litigation position that must be assessed (*id.* at 717-720). Concluding that the government's position in the litigation had been substantially justified, Judge Hunter would have denied fees (*id.* at 721-722).

While the views of Judges Gibbons and Thompson, taken together, are at odds with the decision below, the absence of an opinion for the court in *NRDC* v. *EPA*, *supra*, makes the position of the Third Circuit somewhat unclear. Review by this Court, should it ever become necessary (see pages 17-18, *infra*), should properly await a more definitive statement from the Third Circuit on the rule it intends to follow.[7] Reconciliation of the views expressed by the Third Circuit and the rule announced by the court below is inappropriate for another reason as well. As the district court held (Pet. App. 14b n.14), the Board's position in this case was "substantially justified" under either standard. Although the court of appeals chose to look only to the Board's litigation position, nothing in its opinion suggests that it would have found the underlying agency action unreasonable. Accordingly, there is no reason to grant review in this case, in which the outcome would likely be the same whether the Court adopted

---

[7] The uncertainty surrounding the Third Circuit's position is exacerbated by a recent decision in which the court held that "EAJA awards are not appropriate if the [NLRB] has adopted a reasonable position in the litigation." *Saunders House* v. *NLRB*, No. 82-3594 (3d Cir. Feb. 17, 1984), slip op. 5. As support for its holding, the court (which included Judge Gibbons) cited decisions from other circuits, including the decision below, but neglected to cite its own decision in *NRDC* v. *EPA*, *supra*.

the approach of the Third Circuit or that of the court below.

4. Of greatest significance is the fact that Congress is aware of the issue raised by petitioners and is actively considering legislation that would define "position of the United States" in the statute itself. Section 2412(d) of the EAJA was enacted as a three-year experiment, and it will automatically expire on October 1, 1984, unless extended by Congress. Pub. L. No. 96-481, § 204(c), 94 Stat. 2329, 28 U.S.C. (Supp. V) 2412 note. The Senate bill to extend the Act is S. 919, 98th Cong., 1st Sess. (1983). Since it was introduced in March 1983, S. 919 has been modified to address a number of issues that have arisen in the administration of the statute during its initial experimental period. Among other things, the current working version of the bill provides that " 'position of the United States' includes the underlying agency action which led to the litigation, however fees and expenses shall not be awarded against the United States in defending a litigation position after the date such formal position has become substantially justified." [8] The version of S. 919 containing the definition of "position of the United States" just quoted has been considered by the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, and it is scheduled for consideration by the full Committee later this month.

---

[8] This definition is essentially the same as that proposed by Judge Thompson in her concurring opinion in *NRDC* v. *EPA*, *supra*. The Administration is urging Congress to enact the definition adopted by the court of appeals in the instant case. However the matter is resolved, the important point for purposes of the present petition is that this Court's scarce resources should not be expended on an issue of statutory construction that Congress will likely resolve itself.

The Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee is scheduled to hold hearings on March 14, 1984, on the House bill to extend the Act (H.R. 5059, 98th Cong., 2d Sess. (1984)). Section 2(b) of H.R. 5059 provides that " 'position of the United States' includes, but is not limited to, the actions and omissions of the agency which led to the litigation."

Because of the "sunset" provision contained in the current statute, it is reasonable to assume that Congress will in fact take action on the pending bills before October 1, 1984. Thus, if the Court were to grant the present petition for a writ of certiorari, it could not render a decision until after Congress had passed on the matter; at that point, Congress either will have allowed the Act to expire or it will have reauthorized it in a form that most likely will include a definition of "position of the United States." In either event, the correct interpretation of the current statute would have become a matter of no continuing importance.

In these circumstances, we suggest that the Court should defer to Congress. In the event that Congress extends the Act but fails to legislate a solution to the conflict asserted by petitioners, there will be time enough for this Court to resolve the matter in a subsequent case. In the meantime, as noted by the court below (Pet. App. 26c), only "a minority of cases" are affected by the issue on which petitioners seek review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

LAWRENCE BLATNIK
Attorney

National Labor Relations Board

MARCH 1984

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 421025 506